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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 591

VIVIAN WALSH BARRON, Petitioner,

vs.

THE STATE OF FLORIDA, Respondent.

REPLY BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MILTON E. GRUSMARK
Attorney for Petitioner
1674 Meridian Avenue
Miami Beach, Florida 33139

INDEX TO BRIEF

	Page
ARGUMENT	1
CONCLUSION	4
CERTIFICATE OF MAILING	5

TABLE OF AUTHORITIES

	Page
Dean v. United States, 246 F. 568 (5th Cir.)	2
Strauss v. United States, 311 F.2d 926 (5th Cir.)	2

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This brief is filed in reply to the brief filed for the Respondent.

ARGUMENT

The key to the difference between the positions of the parties is best found in the language in which each poses the critical question to the Court. Respondent rephrases the question to read:

WHETHER THERE IS A DENIAL OF DUE PROCESS IN A CONVICTION FOR FORGERY WHERE THE "STANDARDS" FOR COMPARISON USED ARE PROVED TO BE THE HANDWRITING OF THE DEFENDANT TO THE SATISFACTION OF THE TRIAL COURT?

It is respectfully urged, however, that the question is not whether the trial court found that the "standards" for comparison were proven to the satisfaction of the trial court to have been written by the Defendant but whether the trial court had the right to make that finding despite the absence of competent testimony to prove that the "standards" had been signed by Petitioner.

A comparison of the briefs filed in this case reflects the following additional facts. The federal statute cited by both Petitioner and Respondent requires that the exemplar be either admitted or proved to be the handwriting of the person charged with having committed the forgery.

The 1963 case cited by Petitioner, Strauss v. United States, 311 F.2d 926 (5th Cir.) discloses the existence of competent evidence to substantiate the genuineness of the exemplars. Dean v. United States, 246 F. 568 (5th Cir.) is a 1917 case where the court held that the nature of the documents and books to be used as the exemplars were such as would probably have been written by the Defendant. It is conceded that that case

would have persuasive authority in support of the position of the Respondent were it not for the other facts in this case.

Here the statute requires that the Court be satisfied as to the genuineness of the exemplars. It is not denied in Respondent's brief that there was no direct evidence of the identity of the writers of the documents to be used as standard. Thus, the Court could not be legally satisfied as to genuineness. The jury is only permitted to find one fact, that is, whether the opinion of the handwriting expert is believable beyond a reasonable doubt. The jury is not, however, permitted to determine whether the standards were genuine since that function under the statute is exclusively one to be determined by the Court.

Since the expert's opinion is based on standards, a vital question is the proof of the genuineness of the standards. When the Court finds the standards genuine, the jury is practically told that the case has been made. The proof of the forged document's author is opinion. The proof of the genuineness of the standards must not be opinion, conjecture or assumption. It must be direct, especially where, as here, direct, clear evidence is available. Petitioner submits that the trial court could not find the exemplars genuine in the absence of direct evidence proving, not inferring, that fact.

It would seem that a fair trial would require the presentation to an expert of definitive evidence of a defendant's handwriting before the expert is permitted to give his opinion as to whether the questioned documents were written by the same hand. The weakness of expert testimony is well known. It is in fact an opinion. Here then the opinion of the expert is based upon the assumption that Petitioner wrote the standards because she probably wrote the standards. We therefore have an opinion based on an assumption. This is not consistent with due process.

CONCLUSION

It is respectfully submitted that Thompson v. Louisville, 362 U.S. 199 (1960) and Johnson v. Florida, ___U.S.___, 20 L.ed.2d 830 1968 require that all the elements of a criminal offense be proven. Here none were proven. Each was assumed. We urge the issuance of the writ so that the entire record may be reviewed.

MILTON E. GRUSMARK
1674 Meridian Avenue
Miami Beach, Florida
Attorney for Petitioner

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief for the Petitioner in Support of Petition for Writ of Certiorari was mailed to HON. EARL FAIRCLOTH, Attorney General, 1350 N. W. 12th Avenue, Miami, Florida, this _____ day of November, 1968.

Milton E. Grusmark